



The relief described hereinbelow is SO ORDERED.

Signed December 06, 2004.

A handwritten signature in black ink, reading "Robert D. Berger", is positioned above a horizontal line.

ROBERT D. BERGER
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

LARRY LEE WOODY,
Debtor.

Case No. 02-21662
Chapter 7

LARRY LEE WOODY,
Plaintiff,

v.

Adv. No. 02-6096

U.S. DEPARTMENT OF EDUCATION,
Defendant.

**MEMORANDUM OPINION AND ORDER DENYING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

This student loan dischargeability proceeding is before the Court on the plaintiff's Motion for Summary Judgment.¹ The pleadings do not contest the core nature of this

¹ The plaintiff's Motion for Summary Judgment (Doc. # 40) was filed on March 17, 2004. The defendant's Response to Plaintiff's Motion for Summary Judgment (Doc. # 49) was filed on May 17, 2004. The plaintiff, Mr. Larry Lee Woody, appears by counsel Kenneth M. Gay of Lenexa, Kansas. The defendant, the United States Department of Education, appears by Melanie D. Caro, Assistant United States Attorney, Kansas City, Kansas.

proceeding. The Court finds that this proceeding is core under 28 U.S.C. § 157 and the Court has jurisdiction under 28 U.S.C. §§ 1334 and 157.

The plaintiff, Mr. Larry Lee Woody (“Mr. Woody”), filed his petition for Chapter 7 relief on May 14, 2002. On October 7, 2002, he filed the underlying complaint to determine whether he is entitled to discharge certain student loans. Both Mr. Woody and the defendant, the U.S. Department of Education (“DOE”), have framed the issue as whether excepting the student loans from discharge would create an undue hardship on the plaintiff so as to entitle him to discharge the obligation pursuant to 11 U.S.C. § 523(a)(8). The Court has reviewed the Motion for Summary Judgment and the memorandum submitted in support thereof, as well as the memorandum submitted in opposition, and finds that genuine issues of material fact remain for resolution at trial. Mr. Woody’s Motion for Summary Judgment is therefore denied.

Facts

Mr. Woody’s Memorandum in Support of Plaintiff’s Motion for Summary Judgment (Doc. # 41) sets forth a statement of material facts as to which he contends no genuine issues exist.² The DOE does not contest Mr. Woody’s statement of undisputed material facts.

The following material facts are undisputed and relevant to the disposition of Mr. Woody’s Motion for Summary Judgment:

1. From June 1979 through November 1983, Mr. Woody borrowed a total of \$25,000.00 from Gentry County Bank, Albany, Missouri, under student loan guaranty programs

² Mr. Woody references many additional facts in the “Argument and Authorities” section of his Memorandum in Support of Plaintiff’s Motion for Summary Judgment (Doc. # 41). However, these facts are not set forth in a concise statement of material facts to which he contends no genuine issue exists, as required by D. Kan. LBR 7056.1. As a result, the additional facts will not be considered for the purposes of this Memorandum Opinion and Order.

authorized under Title IV-B of the Higher Education Act of 1965, as amended.

2. Mr. Woody's student loan obligation was incurred in connection with his studies at the Cleveland Chiropractic College.

3. As of November 2, 2002, Mr. Woody owed the defendant \$48,745.78 on his student loan obligation, with interest accruing at a daily rate of \$4.56.

4. Mr. Woody has been a full-time seasonal employee of the Internal Revenue Service since February 2001, working approximately six to six and one-half months each year.

5. Mr. Woody's total adjusted gross income was \$17,428 in 2001, \$19,030 in 2002, and \$10,614 through May 31, 2003.³

Discussion

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment and is made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure. Rule 56(c) makes summary judgment appropriate when, after consideration of the record, the court determines that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."⁴ To determine whether any genuine issues of material fact exist, a court must construe the record liberally in favor of the party opposing the summary judgment.⁵ An issue is "genuine" if sufficient evidence exists on each side "so that a rational trier of fact could resolve the issue either way" and "[a]n issue is 'material' if under the

³ Mr. Woody's statement of uncontroverted fact, to which the defendant did not object, also includes the statement, "Plaintiff's 2003 W-2 reflects income in the amount of \$13,933.76; unemployment in the amount of \$7,958.00 and other income in the amount of \$295.00." Because its meaning is not clear and it is not accompanied by a reference with particularity to the record, as required by local rule, the Court will not consider the statement for the purposes of this Memorandum Opinion and Order.

⁴ FED. R. CIV. P. 56(c).

⁵ *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir. 1988) (citation omitted).

substantive law it is essential to the proper disposition of the claim.”⁶ The moving party has the burden to establish that he or she is entitled to summary judgment.⁷

The question before the Court is whether Mr. Woody may discharge his student loan obligation pursuant to 11 U.S.C. § 523(a)(8). The Bankruptcy Code creates a presumption that student loans are nondischargeable in the absence of undue hardship to the debtor or the debtor’s dependents.⁸ The debtor has the burden of proving that the student loan is dischargeable.⁹

In the Tenth Circuit, “undue hardship” is determined by examination of the factors set forth in the three-part *Brunner* Test.¹⁰ Under *Brunner*, “undue hardship” is established if the debtor proves by a preponderance of the evidence all of the following: (1) that the debtor cannot maintain, based on current income and expenses, a “minimal standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.”¹¹ “[T]o better advance the Bankruptcy Code’s ‘fresh start’ policy, and to provide judges with the discretion to weigh all the relevant considerations, the terms of the [*Brunner*] test must be applied such that debtors who truly cannot afford to repay their loans may have their loans

⁶ *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998).

⁷ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

⁸ 11 U.S.C. § 523(a)(8).

⁹ See *Andersen v. UNIPAC-NEBHELP (In re Anderson)*, 179 F.3d 1253, 1256 (10th Cir. 1999) (debtor bears the burden under § 523(a)(8)).

¹⁰ *Educational Credit Management Corp. v. Polleys (In re Polleys)*, 356 F.3d 1302, 1309 (10th Cir. 2004) (holding that the Tenth Circuit would adopt the three-prong test established by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2nd Cir. 1987)).

¹¹ *Polleys*, 356 F.3d at 1307 (quoting *Brunner*, 831 F.2d at 396).

discharged.”¹²

As an “undue hardship” determination is factually driven and each debtor’s situation is unique, this Court believes this determination is particularly well-suited for disposition in a trial setting. However, the Court recognizes there may be times when disposition by summary judgment motion is appropriate. Such instances are rare and, minimally, require undisputed facts sufficient for the Court to evaluate each debtor’s unique circumstances in light of the *Brunner* Test. In the present case, outside of limited information regarding his employment and annual income, Mr. Woody’s Motion for Summary Judgment fails to set forth facts sufficient for this Court to consider his current standard of living, whether his state of affairs is likely to persist for a significant portion of the repayment period of the student loans, and whether he has made good faith efforts to repay the loans. As a result, Mr. Woody has failed to establish that he is entitled to summary judgment.

Conclusion

For the reasons set forth above, Mr. Woody has failed to establish that he is entitled to summary judgment. Mr. Woody’s Motion for Summary Judgment is therefore denied. A supplemental order setting this matter for evidentiary hearing will be entered forthwith.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS

¹² *Polleys*, 356 F.3d at 1309.